

Appendix A231-A280

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1 Q. Take a look at your opening report
2 and your rebuttal report, and if you can find it, show
3 me where it is.

4 MR. LEWIS: Did you have something
5 else to say?

6 THE WITNESS: Yeah. I think in
7 connection with the discussion we've been
8 having is why this arose; that is, you asked
9 these questions and I'm answering them. You
10 asked if I had an opinion about that and I
11 gave it to you.

12 My understanding is the way this
13 works is that the defendants are afforded the
14 opportunity to establish such a defense, and
15 in my view, they have not done so, and that,
16 from a legal perspective, may be where it
17 ends. That's the area in which I was asked
18 to opine and that's the area about which I
19 have opined.

20 In the course of our conversation,
21 then, I believe you asked me if I had an
22 opinion about that and I said I do, but
23 whether or not I offer that is a matter of
24 what counsel decides to pursue.

25 BY MR. GLUCKOW:

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1 Q. Have you been asked to form an
2 opinion on that question, that question being whether
3 in your opinion the underwriters conducted a
4 reasonable investigation?

5 A. I don't think I've been specifically
6 asked so far to form that opinion. I think I've been
7 asked to address the issue of whether the defendants
8 established that. In the course of reviewing the
9 materials that I've reviewed, based on what I've seen
10 to date and as part of my work in determining whether
11 the defendants have met their burden in that regard, I
12 have formed an opinion about that but, again, I don't
13 know if I will be asked about that and have not
14 discussed that in that sense with counsel.

15 Q. What's your current understanding
16 regarding whether you intend to offer an opinion at
17 trial concerning whether the underwriters conducted a
18 reasonable due diligence investigation?

19 MR. LEWIS: Objection, asked and
20 answered.

21 THE WITNESS: I don't have a current
22 understanding as to whether I would be asked
23 that or not. What I've been asked so far is
24 do I believe the defendants have established
25 that they conducted such an investigation.

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1 It's -- I don't know whether I would be asked
2 to go to the next step of your question and
3 determine whether I have an opinion on
4 whether the due diligence investigation was
5 adequate or not.

6 BY MR. GLUCKOW:

7 Q. Just to be clear, you agree with me
8 that in your two written opinions to date, you have
9 not offered an opinion on that latter question,
10 namely, whether in your opinion the underwriters
11 conducted a reasonable due diligence investigation,
12 correct?

13 MR. LEWIS: Objection to form; the
14 documents speak for themselves.

15 THE WITNESS: I think that's
16 correct, but I'll be glad to check them and
17 see if I did say that or not.

18 BY MR. GLUCKOW:

19 Q. Only if you feel the need to. I'm
20 quite sure you have not given that opinion, but if you
21 want to be comfortable with that, please take your
22 time to do so.

23 A. No, in the way we've been
24 discussing, I have not offered that so far.

25 Q. Thank you.

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1 In terms of the materials
2 considered, Mr. Bessette went over this with you a
3 little bit and I won't take much time on it, but if
4 you would turn to Page 6 of your initial report,
5 Paragraph 11, in connection with the underwriters' due
6 diligence, how did you decide what materials you
7 wanted to review?

8 A. I asked counsel what underwriter
9 materials had been produced, if there was a document
10 production, and what testimony there was on that
11 topic, and they identified that for me as the
12 deposition transcripts and the related exhibits.

13 Q. Did counsel explain to you that
14 there was, in fact, a separate underwriter production
15 referred to in Mr. Necarsulmer's report which I know
16 you've seen, UND1 through 11,636?

17 MR. LEWIS: Objection to form.

18 THE WITNESS: Yeah, there was -- we
19 had some discussion about that, yes.

20 BY MR. GLUCKOW:

21 Q. What do you recall about the
22 discussion?

23 A. I asked what there was in the way of
24 underwriter production. It was described to me there
25 was some amount of it; I don't recall how it was

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1 characterized to me. I asked what it was and if
2 anybody had gone through it, I believe. I don't
3 recall specifically what we discussed about it beyond
4 that. It was not a terribly long discussion about it.
5 I don't recall who suggested it, but I came to the
6 conclusion that I would see what it was that
7 Mr. Necarsulmer produced from that document production
8 to support his opinion, whatever it was going to be.

9 Q. As you sit here today, you have
10 never received or reviewed the underwriters' document
11 production in this case; is that correct?

12 MR. LEWIS: Objection to form.

13 THE WITNESS: It's probably correct
14 with respect to all of it. I know there have
15 been some documents with UND numbers on them
16 and other documents referred to in deposition
17 transcripts and that sort of thing, but I
18 don't believe I have anywhere near the volume
19 that I understand exists.

20 BY MR. GLUCKOW:

21 Q. In fact, at least according to the
22 list on Page 11, the only UND documents you would have
23 received from the underwriters' production would have
24 been those marked as exhibits at depositions, correct?

25 A. From this list, that's correct, and

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1 I think that might be correct overall. I have seen
2 some underwriter documents or documents that have UND
3 markings on them that I don't recall necessarily being
4 referenced in transcripts, but I haven't tried to
5 match them up that way, so it may be that they are all
6 deposition transcripts, I don't know that.

7 Q. In what connection did you see the
8 documents with the UND on them where you think there's
9 at least a possibility that they may not have been
10 deposition transcripts?

11 A. Just in the normal course of
12 reviewing materials in the litigation.

13 Q. You're not aware of any category of
14 documents or information received from the
15 underwriters' production, as you sit here now, other
16 than those marked as deposition exhibits, correct?

17 THE WITNESS: Can I have that back?
18 (The pending question was read
19 back.)

20 MR. LEWIS: Objection to form.

21 THE WITNESS: I think that's
22 correct. I'm not aware underwriters'
23 documents have been categorized otherwise.

24 BY MR. GLUCKOW:

25 Q. For example, I'm looking at your

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1 bullet point listed on Page 6 and I'm just trying to
2 think is there any way that the underwriters' document
3 production could be captured in any of those other
4 bullet points, and I'm not able to come up with any
5 way and I'm asking you whether you can. These are the
6 materials that you considered, correct, at least as of
7 the time of your initial report?

8 MR. LEWIS: Objection to form.

9 THE WITNESS: No, I think you're
10 correct, and as we discussed earlier.

11 BY MR. GLUCKOW:

12 Q. What about the underwriters'
13 responses and objections to the plaintiff's sixth set
14 of interrogatories, which were the underwriters'
15 responses to the plaintiff's so-called contention
16 interrogatories? Those are not listed here. Have you
17 ever reviewed those, to your knowledge?

18 MR. LEWIS: Objection to form.

19 THE WITNESS: I don't recall,
20 specifically. There is at least one set of
21 interrogatory answers that I have reviewed.
22 I do not recall off the top of my head if
23 those are underwriters or not.

24 BY MR. GLUCKOW:

25 Q. Are those interrogatory answers that

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1 you're thinking of listed in the materials that you've
2 considered in any of your reports?

3 A. No.

4 MR. GLUCKOW: Can we mark this,
5 please.

6 (Document Bates Stamped
7 MIL 00090-00115 was marked Exhibit-352 for
8 identification.)

9 BY MR. GLUCKOW:

10 Q. I'm handing you what's been marked
11 as 352; it's from your production in this matter. Is
12 that the set of interrogatory responses you had in
13 mind?

14 A. Yeah, I believe it is.

15 Q. Those are the Adams Golf defendants'
16 responses to the plaintiff's fifth set of
17 interrogatories, correct?

18 A. Correct.

19 Q. Then to the best of your knowledge,
20 you have not reviewed the underwriters' responses and
21 objections to the plaintiff's sixth set of
22 interrogatories, correct?

23 A. Yeah, I think that's correct.

24 Q. Did you review the depositions of
25 the underwriter witnesses?

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1 A. I did.

2 Q. Did you review specifically the
3 deposition transcript of Olga Pulido-Crowe?

4 A. I did.

5 Q. Did you read the entire transcript
6 or just selected portions?

7 A. No, I read it all.

8 Q. Did you read the exhibits that were
9 referred to during that deposition?

10 A. Yes.

11 Q. In your rebuttal report, 335,
12 Pages 22 to 23 address Mr. Necarsulmer's report?

13 A. Right.

14 Q. I'm going to ask you the same
15 question I asked you about your initial report, which
16 is your best estimate for the amount of time it took
17 you to draft Paragraphs 23, 24, and 25 of the rebuttal
18 report.

19 MR. LEWIS: Objection to the form.

20 THE WITNESS: In this connection, I
21 read Mr. Necarsulmer's report, I reviewed
22 Ms. Pulido-Crowe's transcript, I reviewed
23 Mr. Walravens' transcript or -- I think prior
24 to writing this report, I skimmed
25 Mr. Walravens' transcript and reviewed the

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1 exhibits from the reports -- the transcripts,
2 I'm sorry. I think I had a conversation with
3 counsel as to whether there was any factual
4 information I was missing in this context
5 from what I had reviewed and then wrote this
6 language, so that process may have taken five
7 to 15 hours -- I'm trying to give you some
8 decent estimate there -- maybe a little
9 longer than that, somewhere in that
10 neighborhood.

11 BY MR. GLUCKOW:

12 Q. I think you anticipated my next
13 question because I believe the answer you just gave,
14 five to 15 hours, somewhere in that neighborhood,
15 maybe a little more than that, wasn't just in terms of
16 drafting these paragraphs but also included the time
17 you spent considering the issues discussed in those
18 paragraphs, correct?

19 MR. LEWIS: Objection to form.

20 THE WITNESS: Right.

21 BY MR. GLUCKOW:

22 Q. In terms of that conversation with
23 counsel you just mentioned, do you recall anything
24 else about that other than what you testified to
25 already?

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1 MR. LEWIS: Objection to form.

2 THE WITNESS: No, it was a fairly
3 brief conversation of the nature I said. I
4 had summarized what I had observed existed,
5 asked if there was anybody else involved in a
6 significant way in the process, other
7 information that might be missing of that
8 type, and I think that was the nature of the
9 conversation.

10 BY MR. GLUCKOW:

11 Q. What was the answer to that
12 question?

13 A. Basically, no.

14 Q. The information that you had
15 indicated that you had focused on already, if I
16 understood your prior answers correctly, was the Olga
17 Pulido-Crowe deposition transcript and the Walravens'
18 transcript, correct?

19 A. And the exhibits.

20 Q. And the exhibits of those
21 depositions?

22 A. Yeah. I maybe get your question.
23 That is the primary information I looked at related to
24 this topic.

25 Q. Can you think of any other category

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1 of information, other deposition transcripts, other
2 documents that you looked at in connection with this
3 portion of the assignment prior to submitting your
4 rebuttal report?

5 MR. LEWIS: Objection, compound,
6 vague.

7 THE WITNESS: Other than
8 Mr. Necarsulmer's report, I don't believe so.

9 BY MR. GLUCKOW:

10 Q. Question on the drafting process,
11 I'm going to try it with both the initial report and
12 rebuttal report but I can break it up if we need to.

13 As I'm sure you know, there were a
14 couple of drafts of each of your reports produced, I
15 think two of the initial report and two of the
16 rebuttal report, and there are some what I would
17 characterize as minor language changes reflected when
18 you compare the final version of the reports to the
19 drafts that were produced. To the extent there are
20 differences in the final version of the report versus
21 the drafts, tell me how those changes occurred, and
22 what I'm getting at is whether those changes occurred
23 as a result of discussions with counsel, for example,
24 or whether they occurred with you going back and
25 looking at the document for a second or third or

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1 fourth time.

2 MR. LEWIS: Objection, compound,
3 vague.

4 THE WITNESS: I don't know if I can
5 do it that way, although I'd like to.

6 First off, I don't know what was
7 produced exactly, I haven't reviewed the
8 production of the drafts, but as I remember
9 the process, I produced a draft and tended to
10 review it myself as well as have
11 conversations with counsel about it.

12 Generally speaking, counsel's
13 contributions are in the area of grammar and
14 the English language, and that usually
15 additions or substantive changes are work
16 that I add. I could go through them and talk
17 about that, but that's generally the way this
18 process has worked and usually the way I
19 work.

20 BY MR. GLUCKOW:

21 Q. In this particular matter, do you
22 recall any substantive changes offered by counsel as
23 opposed to grammar or English language-type changes?

24 A. Let me see if I can tell that.

25 No, not with respect to the rebuttal

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1 report. It doesn't trigger any memory of substantive
2 input from counsel.

3 Q. Fine; thank you.

4 I noticed in your production I
5 didn't see any notes. Did you keep any notes in
6 connection with your work in this matter?

7 A. No.

8 Q. Any specific reason why?

9 A. No, except in this matter there
10 weren't the source of documents and exhibits and items
11 like that on which I sometimes do take notes as backup
12 or work papers, for example, to a draft and that sort
13 of thing. Here, the drafts basically came out of the
14 review of the materials, and the drafts became the
15 result of what would have been notes otherwise.

16 MR. GLUCKOW: I'm going to mark the
17 AMF rebuttal report.

18 (Mr. Miller's AMF Rebuttal Report
19 was marked Exhibit-353 for identification.)

20 BY MR. GLUCKOW:

21 Q. Mr. Miller, I'm handing you
22 Exhibit-353, which is the rebuttal report that you
23 submitted in AMF. Do you recognize that?

24 A. It's coming back to me.

25 Q. Do you recall whether you used the

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1 AMF rebuttal report as a model or template for the
2 rebuttal -- for the section of the rebuttal report in
3 Adams Golf that dealt with the underwriters' due
4 diligence question?

5 MR. LEWIS: Objection to form.

6 THE WITNESS: Actually, I don't
7 think so. You asked me if I recall using it
8 as a template; is that what you said?

9 BY MR. GLUCKOW:

10 Q. Did you make reference to the AMF
11 rebuttal report in preparing the section of your
12 rebuttal report in Adams Golf contained in
13 Paragraphs 23, 24, 25?

14 A. The language is very similar. I do
15 recall working from it. It was not -- the reason I'm
16 hesitating on this, it was not a copy that looks like
17 this (indicating). It was a copy of the text but not
18 the heading and the report itself that I was working
19 from, but the language is very similar, sure.

20 Q. In the materials considered portion
21 of your rebuttal, and you have to go all the way back
22 to Page 1 of your rebuttal, you mention in addition to
23 what you reviewed in connection with your initial
24 report, you had also reviewed the expert reports from
25 the defendants, James, Sjoquist, Lynch, then Grace and

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1 Necarsulmer. I take it you don't recall reviewing any
2 other materials in connection with the preparation of
3 your rebuttal report?

4 MR. LEWIS: Objection to form.

5 THE WITNESS: I think that that's
6 correct. I don't recall any other materials
7 as I sit here.

8 BY MR. GLUCKOW:

9 Q. I'm going to hand you
10 Mr. Necarsulmer's initial report, which has already
11 been marked as 321 (indicating). Keep your rebuttal
12 report open as well.

13 In the first two sentences of your
14 Paragraph 23 in your rebuttal, you address in a
15 general way the outline of responsibilities that
16 Mr. Necarsulmer has provided. I take it you do not
17 disagree with Mr. Necarsulmer's general outline of
18 what underwriters are supposed to do as part of their
19 due diligence; is that correct?

20 MR. LEWIS: Objection to form,
21 foundation.

22 THE WITNESS: No, I don't think I
23 have a problem with his outline. I think
24 enough areas of it are general enough to
25 cover most of the important areas you'd want

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1 to get into.

2 BY MR. GLUCKOW:

3 Q. When you were responding to my
4 question, I'm assuming you were looking at 6A and 6B
5 of Mr. Necarsulmer's initial report where he provides
6 those general contours; is that correct?

7 MR. LEWIS: Objection to form.

8 THE WITNESS: Correct.

9 BY MR. GLUCKOW:

10 Q. Then on Pages 3 and 4,
11 Mr. Necarsulmer gives a list of 11 areas of activity
12 that he believes the underwriters undertook as part of
13 their due diligence. I take it you don't dispute that
14 the activities reflected in one through 11 actually
15 took place; is that correct?

16 MR. LEWIS: Objection to form and
17 foundation.

18 THE WITNESS: I'm sorry, could I
19 have the question back?

20 (The pending question was read
21 back.)

22 THE WITNESS: There's some judgment
23 calls in here so I'm not sure I can answer
24 it, the way I understand you're asking, that
25 is.

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1 BY MR. GLUCKOW:

2 Q. I'm sorry; go ahead.

3 A. Paragraph 1 on Page 3, it appears to
4 be Mr. Necarsulmer's opinion that the offering process
5 was staffed by a team of sufficient size, experience,
6 and seniority to be appropriate for the project; the
7 offering process was staffed by a team. He then makes
8 the judgment as to the rest of the sentence.

9 Q. Let's do it that way, then. Do you
10 disagree that the team was of sufficient size,
11 experience, and seniority to be appropriate to the
12 project or do you just not have an opinion one way or
13 the other on that, or do you agree?

14 A. First off, I think what I've said
15 about this is that his descriptions of these things
16 are extremely general. They don't refer to people,
17 describe their backgrounds, refer to documents
18 reviewed, information discovered, much more
19 importantly independent analysis performed by the
20 underwriters, investigation work, and that sort of
21 thing except in the most general terms, so you can't
22 tell from his presentation what was done to discharge
23 the obligation to conduct a reasonable investigation
24 to come to the conclusions that they came to.

25 That was, at least at the first

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1 instance, the level of information that I was
2 responding to in my opinions, that is, that
3 specifically with respect to the gray marketing issue,
4 there's no mention of it in here, there's no
5 indication that the issue was uncovered, discussed,
6 analyzed, that independent information was obtained to
7 evaluate it, that the impact of it was considered in
8 any fashion, so I don't see where the generalities
9 that Mr. Necarsulmer describes in these various
10 categories established the adequacy of the
11 investigation conducted by the underwriters in this
12 matter.

13 Q. Are you finished?

14 A. Yeah, I think that responds to your
15 question.

16 Q. Not at all. Move to strike.

17 MR. GLUCKOW: Read back my question.

18 (The preceding question was read
19 back as follows:

20 Question: Let's do it that, way
21 then. Do you disagree that the team was of
22 sufficient size, experience, and seniority to
23 be appropriate to the project or do you just
24 not have an opinion one way or the other on
25 that, or do you agree?)

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1 THE WITNESS: In terms of presenting
2 a defense theory, it does not discuss the
3 people, their backgrounds, their experience,
4 why he thinks they were qualified, what work
5 they did, how they were supervised, and that
6 sort of thing. There's no information
7 presented except the conclusion that he comes
8 to.

9 BY MR. GLUCKOW:

10 Q. I'm asking you whether you agree
11 with that conclusion or whether you haven't formed any
12 opinion on it at all.

13 MR. LEWIS: Objection to form,
14 foundation, and scope of opinion.

15 Go ahead.

16 THE WITNESS: Regarding
17 Mr. Necarsulmer's work, I was asked to
18 determine if he established that the
19 underwriters had conducted an adequate
20 investigation as we've been discussing, and
21 what I'm saying is with respect to
22 Paragraph 1 specifically and then more
23 generally the rest of this work, that he has
24 not presented any information on which
25 someone could make that determination. What

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1 he's presented is his conclusions as to those
2 things.

3 BY MR. GLUCKOW:

4 Q. I understand that you're not happy
5 with Mr. Necarsulmer's report, and that's fine, we'll
6 deal with that. What I'm asking you is whether you
7 have any opinion of your own regarding whether the
8 offering process was staffed by a team of sufficient
9 size, experience, and seniority to be appropriate for
10 the project, and if you haven't formed an opinion on
11 that, that's fine, just tell me that.

12 MR. LEWIS: Objection to form and
13 foundation.

14 Go ahead.

15 THE WITNESS: I've had thoughts
16 about that. I don't know that I've actually
17 formed a formal opinion on that as you're
18 asking me, as I think you may be asking me
19 here.

20 My thoughts in that area have been
21 that there was no managing director actually
22 involved in the process, as far as I could
23 tell. From the information I've reviewed so
24 far, Mr. Francis was a figurehead whose
25 fingerprints are not on the project, that

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1 Ms. Pulido-Crowe was hoping to become a
2 managing director and was at the time -- I
3 forget the next title, I think it was vice
4 president -- conducting oversight on the
5 work, much of which was delegated to
6 Mr. Walravens and a financial analyst whose
7 name, unfortunately, I can't recall, and that
8 I'm not sure I saw any evidence of
9 involvement by more senior personnel with
10 perhaps more business experience and
11 background with regard to critical issues
12 such as gray marketing, and if the team had
13 the experience to be appropriate for the
14 project, I saw no evidence of inclination to
15 perform independent analysis with respect to
16 the gray market issue specifically from that
17 team, which suggested either a lack of
18 experience in the area or a simple failure to
19 follow up on information that was obviously
20 deserving of follow-up.

21 BY MR. GLUCKOW:

22 Q. You don't dispute that the
23 underwriters had discussions with senior management at
24 the company concerning the gray market issue, correct?

25 MR. LEWIS: Objection to form.

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1 THE WITNESS: No, I don't dispute,
2 from what I've seen, that they had
3 discussions with a couple of management
4 people about the topic.

5 BY MR. GLUCKOW:

6 Q. You don't dispute that the
7 underwriters conducted telephone interviews with at
8 least seven of Adams' top customers concerning a
9 variety of topics, correct?

10 MR. LEWIS: Objection to form and
11 foundation.

12 THE WITNESS: No, I don't dispute
13 that from what I can see those interviews
14 took place; no.

15 BY MR. GLUCKOW:

16 Q. Don't you consider those interviews
17 an example of the kind of independent verification
18 that you're referring to?

19 A. No. That is that the conduct of
20 outside interviews absent management participation is
21 important, but when no specific questioning is made
22 about the gray marketing or the effect of gray
23 marketing, more importantly, no contact was made with
24 any of the people who had complained about gray
25 marketing, no documentation or correspondence was

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1 reviewed with respect to the complaints about gray
2 marketing, no independent follow-up was made to
3 determine if it was a problem or what the impact of it
4 was other than the assurance that I believe it was
5 Mr. Adams gave to Ms. Pulido-Crowe with respect to
6 Costco by saying don't pursue your own independent
7 inquiry of Costco, I'll take care of them, or
8 something to that effect, and/or Ms. Pulido-Crowe's
9 assessment that since her husband wouldn't purchase
10 sporting goods items at Costco, that it was not likely
11 to be a threat to Adams Golf.

12 Those are what I remember about the
13 disposition of the issue with management, but that
14 seemed to end the inquiry, from what I can tell.

15 Q. One of the things you said in that
16 answer was that there was no mention of the gray
17 marketing issue in the customer surveys; is that
18 correct?

19 A. Right.

20 Q. There was a specific question that
21 said are there any other issues, legal, contractual,
22 or otherwise, which you feel are important; isn't that
23 correct?

24 MR. LEWIS: Objection to form.

25 THE WITNESS: I understand that was

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1 a question on the outline.

2 BY MR. GLUCKOW:

3 Q. You understand that was a question
4 that was asked of the customers who were interviewed
5 by the underwriters, correct?

6 A. I understood it was a question on
7 the outline to be asked. I don't recall reading
8 enough detail about the actual conversations to know
9 if it was asked or how it was asked or what the
10 inclination of the customer would have been to provide
11 the information over the telephone, what their
12 attitude toward Adams was at that point as a customer
13 trying to acquire a hot club in that market. I don't
14 know a lot of those things about the customer
15 interviews over the telephone.

16 Q. Did you review the actual record
17 reflecting the 11 interviews that the underwriters
18 conducted which show the responses received?

19 A. I saw at least some of that
20 information in some exhibits, yes.

21 Q. Isn't it true that in going through
22 each and every one of those 11 telephone interviews,
23 not a single one of the responses indicated any
24 concern about gray market or Costco?

25 MR. LEWIS: Objection to foundation

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1 and form; misstates the evidence.

2 THE WITNESS: I don't recall seeing
3 any mention in the responses of Costco or
4 gray marketing.

5 BY MR. GLUCKOW:

6 Q. Mr. Necarsulmer says, in his
7 rebuttal report which I know you've seen, these kinds
8 of interviews with independent parties are the type of
9 work underwriters should engage in to confirm
10 discussions with company management. Don't you agree
11 with that?

12 MR. LEWIS: Objection to form.

13 THE WITNESS: Again, as a general
14 category, I certainly agree that underwriters
15 should conduct independent interviews with
16 outside parties to confirm information they
17 have received from management. Whether or
18 not the way these were done, the basis of the
19 selection of the parties to interview, and
20 all those sorts of things were adequate are,
21 I think, question marks at this point in that
22 area.

23 BY MR. GLUCKOW:

24 Q. Again, the only deposition
25 transcripts of underwriters you can recall reading are

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1 Pulido-Crowe and Walravens', correct?

2 MR. LEWIS: Objection to form.

3 THE WITNESS: I believe that's

4 correct.

5 BY MR. GLUCKOW:

6 Q. You've never reviewed the
7 underwriters' document production in this case,
8 correct?

9 A. Other than those we've discussed.

10 Q. Other than as marked as exhibits at
11 depositions, correct?

12 A. I think that's correct.

13 Q. You referred to a conversation
14 between Pulido-Crowe and Mr. Adams regarding gray
15 marketing and Costco. Is it your understanding that
16 the only discussions that the underwriters had
17 concerning the gray market issue took place between
18 Ms. Pulido-Crowe and Mr. Adams?

19 MR. LEWIS: Objection to form.

20 THE WITNESS: No, I don't think
21 that's necessarily right. I think there were
22 conversations with one of the other
23 management people at least, maybe two others,
24 of the salespeople --

25 BY MR. GLUCKOW:

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1 Q. Gonsalves?

2 A. -- the sales executives, Gonsalves
3 and --

4 Q. Beebe?

5 A. -- possibly Beebe, about that topic.

6 Q. How many conversations are you aware
7 of between the underwriters and Adams' management
8 concerning the gray marketing or Costco issue?

9 A. As far as I can recall, I don't
10 recall reference to more than a few outside of the
11 Hoffman letter issue, if we can call it that, but with
12 respect to pursuing independent investigation and that
13 sort of thing, essentially none.

14 MR. LEWIS: I want to back up and
15 retroactively object to the question
16 suggesting that there was a conversation with
17 Beebe since the record does not reflect any
18 such conversation. It misstates --

19 MR. GLUCKOW: I disagree with your
20 characterization, but the record will speak
21 for itself.

22 BY MR. GLUCKOW:

23 Q. What's your basis for saying that
24 Mr. Francis's role was purely as a figurehead?

25 A. Ms. Pulido-Crowe's testimony to that

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1 effect.

2 Q. You take from Ms. Pulido-Crowe's
3 testimony that Francis was nothing more than a
4 figurehead?

5 A. In very shorthand form, yes --

6 Q. Do you have any other basis for
7 that?

8 MR. LEWIS: Please don't cut him
9 off.

10 BY MR. GLUCKOW:

11 Q. I'm sorry.

12 A. She described, as I recall, his
13 attendance at certain meetings, his fronting the
14 presentations to the commitment committee, and what I
15 would describe as more of a political role in the
16 process than a substantive role in an investigatory
17 way or anything of that nature.

18 Q. Any other basis for that statement?

19 MR. LEWIS: Objection to form and
20 foundation.

21 THE WITNESS: Only that in
22 discussing the functions that they were
23 performing, in the deposition I don't recall
24 either Pulido-Crowe or Walravens referring to
25 Francis having done anything in the process

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1 of conducting investigation or interviews or
2 any of those sorts of functions other than,
3 as Pulido-Crowe describes, in what I'll call
4 a more political role.

5 BY MR. GLUCKOW:

6 Q. Is it your opinion the underwriters
7 should have contacted Costco?

8 MR. LEWIS: Objection to form and
9 foundation.

10 THE WITNESS: I don't know, I hadn't
11 thought about that specifically, but I
12 certainly think, backing up a step, in terms
13 of generality they certainly should have
14 investigated the Costco matter independently,
15 whether that involved contacting Costco,
16 which was certainly one possibility since
17 Lehman Brothers appeared to have some entree
18 to Costco, I don't recall specifically what
19 that was, but contacting Costco directly
20 seemed to be one choice, contacting an
21 industry expert with knowledge of those types
22 of things to conduct an independent analysis
23 is another choice; there may have been
24 different ways to accomplish that. I haven't
25 thought further about how that should have

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1 been done, but something should have been
2 done along those lines to pursue that issue.

3 BY MR. GLUCKOW:

4 Q. As you sit here today, what is it
5 that you think needed to be done to have what, in your
6 view, would have been a reasonable investigation?

7 MR. LEWIS: Objection to form and
8 foundation, compound, and we've been over a
9 lot of this already.

10 Go ahead.

11 THE WITNESS: Again, that's an area
12 I have not been asked for specific opinions
13 on to this time. I have produced the opinion
14 so far that Mr. Necarsulmer has not
15 demonstrated that a reasonable and adequate
16 investigation was performed, which is what I
17 was asked to opine to in this area.

18 Having conducted some analysis of
19 this and reviewed the information we
20 discussed so far today, I have reached some
21 opinions about what I know so far appeared to
22 have been done or not done, and that's the
23 basis on which I am answering your questions
24 now.

25 In terms of what should have been

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1 done to conduct a reasonable investigation,
2 at a minimum, the project should have been
3 staffed sufficiently to ensure that somebody
4 would take the responsibility to conduct an
5 independent investigation of potential
6 problem areas as they arose. The one I'm
7 concerned about, obviously, is gray
8 marketing.

9 When that appeared to be an issue,
10 based on the information that clubs were
11 appearing in Costco, the underwriters should
12 have conducted an independent investigation
13 as to what that meant, what effect it was
14 having on the retailers and distributors,
15 what effect it was having on customers, how
16 Costco was obtaining the clubs, whether it
17 was likely to continue, what effect gray
18 marketing had on companies that suffered from
19 it.

20 The red flag, I believe, had been
21 raised once the underwriters obtained
22 knowledge of the clubs' appearance in Costco.
23 The issue had been raised by appearance in
24 Callaway's 10-K and industry knowledge was
25 available, according to Mr. Magnussen, about

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1 gray marketing, so it doesn't seem as though
2 it should have been all that difficult to get
3 into the industry and get information about
4 that and, thereafter, determine what to do
5 about it.

6 BY MR. GLUCKOW:

7 Q. Anything else, because we're going
8 to go through each of these, but I want to know if
9 there's anything else before we do?

10 MR. LEWIS: We're at five of six.
11 We started nine hours ago, which is okay.
12 We're all tired. The witness, I'm sure --
13 I'm tired, at least. Maybe everybody else
14 isn't, but I'm very tired. The witness is
15 tired. We're very close, if not past, the
16 seven-hour limit. I want to give you some
17 leeway, but we're going to have to cut off at
18 some point.

19 MR. GLUCKOW: If you're tired, the
20 witness is tired, I'm happy to pick this up
21 on Monday, but here's my point --

22 MR. LEWIS: We're not picking up
23 Monday.

24 MR. GLUCKOW: That's fine, we'll
25 just keep going; I'm not suggesting that we

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1 need to.

2 All I'm saying is you had as much
3 time as you needed with Mr. Necarsulmer,
4 right, and they had as much time as they
5 needed upstairs today with Mr. James.

6 MR. LEWIS: Right, but nobody has
7 gone past the seven-hour limit, as far as I'm
8 aware of, and that's established by the
9 rules. I'm not trying to be difficult about
10 it, but you don't get to go on until ten
11 o'clock because you have questions until ten
12 o'clock; you have your limit. I'm trying to
13 be flexible on it, but if you're not going to
14 be flexible with me and find a way to meet
15 some reasonable limit at this time of day,
16 then we're going to have to cut it off.

17 MR. GLUCKOW: I certainly intend to
18 be reasonable but I certainly also intend to
19 complete the examination, so hopefully that
20 will be something we can both live with.

21 MR. LEWIS: It's got to be pretty
22 soon.

23 BY MR. GLUCKOW:

24 Q. I think I was asking you was there
25 anything else before we go back through these items.

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1 A. I have not compared the outline of
2 Mr. Necarsulmer in here with the paragraphs that I had
3 submitted outlining an underwriter's responsibilities
4 in the context of due diligence to see how his
5 opinions stack up against those.

6 (Mr. Bessette leaves the
7 deposition.)

8 (Mr. Collins enters the deposition.)

9 THE WITNESS: Without having done
10 that, I think the additional red flag that
11 exists in these materials, to those I've
12 already discussed, would be in Paragraph 6,
13 which --

14 BY MR. GLUCKOW:

15 Q. I'm sorry, Paragraph 6 of?

16 A. I'm sorry, Page 3 of
17 Mr. Necarsulmer, which refers to the commitment
18 committee memo, I believe, which did have a line in it
19 referring to the importance of maintaining margins, I
20 believe it was, at Adams and how those could not be
21 allowed to deteriorate or something to that effect,
22 so, again, that identifies someone was aware of the
23 general issue of margin maintenance but not in the
24 specific wording of gray marketing.

25 Having said that, I think the answer

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1 I gave you previously probably covers at least the
2 major areas of where I would be today on this issue
3 since you raised it and asked me.

4 Q. Can you think of any other areas? I
5 don't want you to say that they're just the major
6 ones. Can you think of any other areas as of today
7 that you think would have required follow-through --

8 MR. LEWIS: Objection.

9 BY MR. GLUCKOW:

10 Q. -- in your opinion?

11 MR. LEWIS: Form, foundation, scope
12 of the opinion.

13 THE WITNESS: Again, I haven't been
14 asked to form an opinion on that prior to
15 this time and I've been giving you the
16 thoughts I have in this area in response to
17 your questions, and I think I hit on the
18 major area, particularly with respect to gray
19 marketing, and that being the lack of
20 independent investigation by the underwriters
21 of the issue and the willingness to accept
22 Mr. Adams' assertion he would take care of
23 the Costco problem and essentially leaving it
24 at that, so I think that probably covers it
25 with respect to that issue.

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1 I have not sat here and attempted to
2 go beyond that and think about every other
3 area they may have been deficient in their
4 work, and have not been asked to do that to
5 this point, but I think the major issue with
6 respect to gray marketing would be covered by
7 that topic.

8 BY MR. GLUCKOW:

9 Q. Putting aside the gray market issue
10 or the Costco issue, however you want to phrase it,
11 you're not offering any opinion that the underwriters'
12 investigation was less than reasonable in any other
13 way, are you? I've never heard you suggest otherwise.

14 MR. LEWIS: Objection to form,
15 foundation, scope.

16 BY MR. GLUCKOW:

17 Q. Am I correct?

18 A. I haven't been asked that question.
19 I haven't been asked to focus on areas other than gray
20 marketing, so I couldn't answer that in that sense.

21 Q. The margins issue you mentioned
22 before with respect to Paragraph 6 is reflected in the
23 prospectus, correct?

24 A. Again, in a very general way, the
25 issue of maintenance of sales price margin is

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1 mentioned in the prospectus, but that's all it says in
2 the prospectus, is basically that one line.

3 Q. Are you aware of Mr. Frazier's
4 opinion, Professor Frazier's opinion, in this case?

5 A. I don't believe so.

6 Q. You haven't seen the transcript of
7 his deposition from earlier this week?

8 A. I have not.

9 MR. LEWIS: In five minutes, I'm
10 going to ask the court reporter to do a
11 calculation of time for us so we can reach
12 some conclusion here.

13 BY MR. GLUCKOW:

14 Q. I think we've confirmed this, but if
15 you turn to Paragraph 25 on Page 23 of your rebuttal
16 report, in the last sentence you state in your opinion
17 the expert report of Mr. Necarsulmer does not meet the
18 underwriters' burden to demonstrate that the
19 investigation and/or resulting disclosures were
20 reasonable and adequate, correct?

21 A. Right.

22 Q. You're not offering an opinion in
23 this report, I think we've established, dealing with
24 whether in your opinion the underwriters'
25 investigation was reasonable, correct; you have not

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1 offered a written opinion on that question?

2 MR. LEWIS: Objection to form.

3 THE WITNESS: That's correct.

4 BY MR. GLUCKOW:

5 Q. What are your qualifications to
6 opine on whether Mr. Necarsulmer has met the
7 underwriters' burden?

8 MR. LEWIS: Objection to form,
9 foundation; calls for legal conclusion.

10 THE WITNESS: I think we've
11 discussed those earlier today at some length.

12 BY MR. GLUCKOW:

13 Q. You have nothing to add to the
14 qualifications that enable you to offer that opinion
15 other than what we talked about earlier?

16 MR. LEWIS: Objection to form,
17 foundation, legal conclusion.

18 THE WITNESS: Yeah, I think that's
19 probably correct in terms of background,
20 education, work experience, and that sort of
21 thing.

22 Having said that and having reviewed
23 the information that I've reviewed that we've
24 discussed, having reviewed Mr. Necarsulmer's
25 report, it's a fairly easy matter in the

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1 sense of reading the English language to
2 determine that he has not presented the sort
3 of information that one would need to present
4 to meet the burden as outlined in my report
5 and rebuttal report and as outlined in
6 Mr. Necarsulmer's report as well.

7 BY MR. GLUCKOW:

8 Q. I take it you've never been a judge,
9 correct?

10 MR. LEWIS: Objection to form.

11 THE WITNESS: Correct.

12 BY MR. GLUCKOW:

13 Q. Have you reviewed Mr. Necarsulmer's
14 rebuttal report?

15 A. Yes.

16 Q. Have you considered the extent to
17 which, if at all, Mr. Necarsulmer's rebuttal report
18 alters the opinion that you've offered in your
19 rebuttal report and your initial report?

20 MR. LEWIS: Objection to form,
21 foundation.

22 THE WITNESS: I did, when I reviewed
23 Mr. Necarsulmer's rebuttal report.

24 BY MR. GLUCKOW:

25 Q. And the results of that

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1 consideration?

2 A. I'd have to review that again
3 quickly to tell you.

4 Q. Sure. It's already been marked.
5 I'll hand you a copy. It's Exhibit-322 (indicating).

6 MR. LEWIS: While you're reviewing
7 that, Mr. Miller, let's have the court
8 reporter do the Herculean task of figuring
9 out how much time we have used.

10 THE COURT REPORTER: Seven and a
11 half hours of testimony.

12 MR. LEWIS: I'll let him answer your
13 last question.

14 MR. GLUCKOW: No, no, no.

15 MR. COLLINS: Let's go off the
16 record.

17 (Discussion held off the record.)

18 MR. GLUCKOW: Plaintiffs have
19 announced that in ten minutes this dep is
20 over in terms of defendant's questioning.

21 Defendants are reserving all their
22 rights but are happy to ask ten more minutes'
23 worth of questions.

24 MR. LEWIS: Let's also state on the
25 record that we have already been advised by

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1 the court reporter's calculations that we are
2 at the seven-and-a-half-hour mark in terms of
3 deposition time and it is late in the day and
4 we did start somewhat earlier.

5 MR. GLUCKOW: I have said that I'm
6 happy to come back if we need to and you had
7 four hours with Mr. Necarsulmer and whatever
8 with Mr. James.

9 Let's move on.

10 (The preceding question was read
11 back.)

12 BY MR. GLUCKOW:

13 Q. Now that you have Mr. Necarsulmer's
14 rebuttal report in front of you, Exhibit-322, we were
15 discussing whether your review of the rebuttal report
16 caused you to reconsider the opinions set forth in
17 your own rebuttal report, that is, that
18 Mr. Necarsulmer had not met the underwriters' burden
19 to demonstrate that the investigation and/or resulting
20 disclosures were reasonable and adequate.

21 MR. LEWIS: Objection to form.

22 THE WITNESS: It does not cause me
23 to change my opinion.

24 BY MR. GLUCKOW:

25 Q. Why?

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1 MR. LEWIS: Objection to form,
2 compound.

3 THE WITNESS: Essentially, because
4 there's nothing substantive added in
5 Mr. Necarsulmer's rebuttal report.

6 BY MR. GLUCKOW:

7 Q. Did you review the various
8 deposition testimony cited in Mr. Necarsulmer's
9 rebuttal report?

10 A. I reviewed some of that testimony.
11 I reviewed Ms. Pulido-Crowe and Mr. Adams' deposition
12 transcripts on those areas. I reviewed -- among this
13 list, that was it.

14 Q. Did you review the various documents
15 with the UND prefix cited in Mr. Necarsulmer's
16 rebuttal report?

17 A. I did not, nor did I believe that
18 would likely change my opinion.

19 Q. Why is that?

20 A. Because all this has to do with
21 acceptance of management's assertions with respect to
22 gray marketing and indicates no independent
23 investigation by the underwriters and no contribution
24 to that area beyond what existed in Mr. Necarsulmer's
25 original report.

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1 Q. Notwithstanding 3C, which obviously
2 refers to independent phone calls with third parties,
3 correct?

4 MR. LEWIS: Object to the form.

5 THE WITNESS: Right, which we've
6 already discussed today.

7 BY MR. GLUCKOW:

8 Q. Do you agree with Mr. Necarsulmer's
9 statement in D on Page 2 that the reasonableness of
10 underwriters' due diligence must be assessed based on
11 the information that is reasonably available at the
12 time of the offering?

13 MR. LEWIS: Objection to form,
14 foundation, legal conclusion.

15 THE WITNESS: Sure.

16 BY MR. GLUCKOW:

17 Q. I assume you agree with
18 Mr. Necarsulmer's statement in F that the mention of a
19 risk in one issuer's filings is not necessarily
20 determinative of whether the risk needs to be included
21 in another issuing company's registration statement,
22 correct?

23 MR. LEWIS: Objection to form,
24 foundation.

25 THE WITNESS: I agree with it in

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1 exactly the limited way it is stated; that
2 is, I agree that such an identification is
3 not determinative of inclusion but certainly
4 constitutes a red flag warranting
5 investigation by the underwriter.

6 BY MR. GLUCKOW:

7 Q. Sitting here today, do you know
8 whether the underwriters considered Callaway's 10-K
9 disclosure that you mentioned earlier as part of their
10 analysis?

11 MR. LEWIS: Objection to form and
12 foundation.

13 THE WITNESS: Not specifically. I
14 do recall thinking for some reason that they
15 knew about it, but I don't remember why I
16 think that.

17 BY MR. GLUCKOW:

18 Q. As you sit here today, you believe
19 the underwriters were aware of the Callaway 10-K
20 disclosure as part of the due diligence process?

21 MR. LEWIS: Objection;
22 mischaracterizes his testimony.

23 THE WITNESS: I think that -- as
24 best I recall, I remember thinking that they
25 were, but like I said, I don't remember why I

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1 think that.

2 BY MR. GLUCKOW:

3 Q. You agree with the last sentence of
4 Mr. Necarsulmer's F, each factual situation is
5 different and the underwriters must evaluate
6 appropriate disclosure on an individual basis,
7 correct?

8 MR. LEWIS: Objection, form and
9 foundation.

10 THE WITNESS: Sure; I presume he's
11 talking about an individual company basis.
12 Sure, that makes sense.

13 BY MR. GLUCKOW:

14 Q. Do you agree with this statement:
15 The underwriters made their main inquiry concerning
16 gray marketing in the due diligence meetings in April
17 1998?

18 MR. LEWIS: Objection to form,
19 foundation.

20 THE WITNESS: I don't believe I have
21 an opinion on that.

22 BY MR. GLUCKOW:

23 Q. Explain what you mean by that.

24 MR. LEWIS: Objection.

25 THE WITNESS: I haven't attempted to

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1 determine or rank the level of inquiry that
2 they made in such a fashion that I would make
3 a statement that way. That does appear to be
4 when the topic arose. Subsequent to that, I
5 didn't see any indication that there was
6 independent investigation done of that topic.
7 It ended up not appearing in the prospectus,
8 so I don't have any reason to not think that
9 was the case, but I also don't -- I have not
10 looked into that as an issue in itself to be
11 able to say it that way; I wouldn't have
12 thought of putting it that way. I also don't
13 have any reason to question it. I haven't
14 seen any indication to the contrary.

15 BY MR. GLUCKOW:

16 Q. Do you know whether there were
17 discussions concerning the gray marketing issue
18 between the underwriters and Adams' management in
19 June 1998?

20 MR. LEWIS: Objection to form,
21 foundation.

22 THE WITNESS: Yeah, I think we
23 discussed that briefly earlier in connection
24 with the Hoffman letter, was what I remember
25 that being about, in June.

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1 BY MR. GLUCKOW:

2 Q. Do you know whether there were any
3 discussions between the underwriters and Adams'
4 management concerning gray marketing or Costco in
5 connection with the Adams' press release in early June
6 concerning the Costco issue?

7 MR. LEWIS: Object to the form.

8 THE WITNESS: Again, I recall that
9 there was some discussion about that in
10 connection with the Costco issue as presented
11 in the press release and limited to that as
12 opposed to the overall problem of gray
13 marketing and sale of clubs through Costco
14 and the implications that that had for the
15 company.

16 BY MR. GLUCKOW:

17 Q. What's the basis for your last
18 answer?

19 A. My understanding of the conversation
20 -- the conversations that occurred around the Hoffman
21 letter with respect to addressing the SEC's inquiry
22 about whether the issue discussed in the Hoffman
23 letter had been investigated or examined by the
24 company according to materiality standard.

25 MR. LEWIS: We have to shut it down

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1 at this point. We're just at the time
2 lengths -- we're way past. This was
3 scheduled in this fashion at your guy's
4 request. There was no anticipation of going
5 after six o'clock on a Friday afternoon. We
6 all have different plans and travel plans.

7 I have one question, possibly the
8 famous one question, for Mr. Miller to get on
9 the record before we terminate.

10 MR. GLUCKOW: I'm going to object to
11 your shutting down the deposition because I
12 have not finished my examination, and I will
13 reserve all my rights.

14 MR. COLLINS: Any idea how much
15 more? We've been through this before and
16 asked you that question.

17 MR. GLUCKOW: Part of the problem is
18 every time I ask more questions, I'm getting
19 new opinions from the witness that are not
20 reflected in his written opinions in the
21 case.

22 MR. LEWIS: Because you're asking
23 him for them, you're asking what opinions he
24 may have formed aside of the opinions that he
25 has been engaged to express, and so if you

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1 keep asking someone for views they have, it's
2 not going to be surprising if they have
3 views.

4 MR. GLUCKOW: If you were willing to
5 tell me he isn't going to offer any opinions
6 concerning the underwriters' due diligence
7 beyond that which is contained in his written
8 reports, I told you a long time ago this
9 could have been completed much sooner, but
10 you won't give me that, and because you won't
11 give me that, I need to know what opinions he
12 has formed on that topic.

13 MR. LEWIS: You still haven't
14 answered Todd's question of how much longer
15 do you have to go. We're talking about
16 travel arrangements at this point for people,
17 including the witness.

18 MR. GLUCKOW: Quite honestly, based
19 on this last exchange, I think I have
20 probably another half an hour, at least.

21 MR. COLLINS: Why don't you proceed
22 with your questioning.

23 BY MR. LEWIS:

24 Q. Mr. Miller, aside from the opinions
25 that have been expressed in your various reports about